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5 BEFORE THE POLLUTION CONTROL HEARINGS BOARD
6 STATE OF WASHINGTON

7 STATE OF WASHINGTON, DEPARTMENT OF)
8 ECOLOGY,)

9 Appellant,)

10 v.)

11 TACOMA-PIERCE COUNTY HEALTH)
12 DEPARTMENT and LAND RECOVERY, INC.)

13 Respondents.)
14)
15

11/11/91 19
PCHB No.91-124

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER OF DISMISSAL

16 This matter came before the Pollution Control Hearings Board
17 on May 29, 1991, on the Respondents' motion to dismiss the appeal.
18 The Department of Ecology is represented by Mary Sue Wilson,
19 Assistant Attorney General. The Tacoma-Pierce County Health
20 Department is represented by Preston, Thorgrimson, Shidler, Gates
21 & Ellis by Bob Backstein. Land Recovery, Inc. is represented by
22 Heller, Ehrman, White & McAuliffe by Dan Syrdal and Leslie
23 Nellermoe. Having reviewed the pleadings, heard the arguments of
24 the parties and reviewed the memoranda and supporting documents
25 filed by the various parties, the Board hereby makes the
26 following:
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FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER OF DISMISSAL - 1

HELLER EHRMAN WHITE & MCAULIFFE
ATTORNEYS
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FINDINGS OF FACT

1. Land Recovery, Inc. (LRI) owns and operates a municipal solid waste landfill, the Hidden Valley Landfill, in Pierce County, Washington. LRI is required to obtain a permit to operate the landfill.

2. The Tacoma-Pierce County Health Department (TPCHD) is the agency charged with permitting landfill operations in Pierce County. The Department of Ecology has oversight responsibilities as provided in Chapter 70.95 RCW.

3. On March 20, 1991, the TPCHD amended the 1990-1991 Hidden Valley Landfill permit which was due to expire on April 15, 1991. Included in the amendments was approval of the Post-1991 Master Plan for the landfill. The Department of Ecology (Ecology) did not appeal this action, but orally informed LRI and the TPCHD that it was likely Ecology would not approve the landfill development which it viewed as an expansion.

4. On April 15, 1991, the TPCHD renewed the Hidden Valley Landfill Permit for the period between April 1991 and April 1992. The renewal permit incorporated the March 1991 amendments to the operating permit. It was mailed to Ecology on April 16, 1991.

5. According to a date stamp on Ecology's copy of the permit renewal, which is prima facie evidence of the date of receipt, Ecology received it on April 18, 1991. The thirtieth day after April 18 is May 18, 1991. May 18, 1991 is a Saturday.

6. Ecology filed an appeal of the permit renewal on Monday, May 20, 1991.

1 7. On May 21, 1991, LRI moved for dismissal of the appeal
2 on the ground that it was not filed in a timely fashion. LRI also
3 asked that its motion to dismiss be heard on an accelerated
4 schedule.

5 8. The Board denied LRI's request to shorten time and heard
6 the argument on the motion to dismiss the appeal on May 29, 1991.

7 9. At the close of the hearing on May 29, 1991, the Board
8 indicated its inclination to grant the motion to dismiss, and gave
9 the parties additional time to brief the applicability of RCW
10 1.12.040 to the question presented by the motion to dismiss.

11 Having entered the foregoing Findings of Fact, the Board
12 hereby makes the following:

13 CONCLUSIONS OF LAW

14 1. The Pollution Control Hearings Board has the authority
15 to determine whether an appeal is timely filed.

16 2. Ecology's failure to appeal the amendments to the 1990-
17 91 permit does not bar it from appealing the same conditions in
18 the 1991-92 permit. The statutory limitation period for appealing
19 the first permit is not applicable to the second permit. Also,
20 there exists no equitable justification on the present facts to
21 deny Ecology's appeal.

22 3. The Board construes RCW 70.95.185 as requiring Ecology
23 to review and appeal solid waste permits within thirty days of
24 issuance. RCW 70.95.190 makes the Ecology review and appeal
25 provisions applicable to permit renewals.

26 4. RCW 70.95.185 does not mention the time at which a
27 potential appellant receives the permit, instead it refers to the
28

1 "issuance" of the permit. RCW 70.95.185 does not define
2 "issuance." The term "issuance" is ambiguous. It is reasonable
3 to conclude, and the Board does conclude, that "issuance" means
4 "when received by Ecology". That interpretation is consistent
5 with other statutes conferring jurisdiction on the Board, the
6 Board's own definition of the word "communicate" in WAC 371-08-
7 080, and with RCW 43.21B.230. These other sources all state that
8 an appeal period will commence upon receipt of the order or permit
9 being appealed.

10 5. The thirtieth day following Ecology's receipt of the
11 1991-92 renewal fell on a Saturday. RCW 70.95.185 does not
12 specify when an appeal must be filed if the thirtieth day of the
13 appeal period is on a Saturday.

14 6. The Board's rules, WAC 371-08-146, incorporate by
15 reference the statutes and rules governing pretrial procedures in
16 the superior courts. The civil rules for superior court provide a
17 method for computing time that allows one to postpone an act until
18 the next business day if the act is to be performed on a Saturday,
19 Sunday, or legal holiday.

20 7. The civil rules are not applicable in this instance.
21 Until the Board acquires subject matter jurisdiction by the timely
22 filing and service of an appeal, neither the Board's procedural
23 rules nor the superior court's procedural rules are applicable.
24 Douchette v. Bethel School District, 58 Wn.App. 824, 795 P.2d 162
25 (1990); Tarabochia v. Town of Gig Harbor, 28 Wn. App. 119, 622
26 P.2d 1283 (1981).

1 8. A statute of general application, RCW 1.12.040,
2 "Computation of time", governs this situation. The statute
3 provides that the first day of the thirty day period is excluded
4 and the last day is included unless it falls on a Sunday or
5 holiday.

6 9. Saturdays are not excluded from the computation of the
7 appeal period, nor are Saturdays to be considered "holidays" for
8 purposes of applying RCW 1.12.040 to this case.

9 10. Any Finding of Fact that is a Conclusion of Law is
10 hereby adopted as such.

11 11. Ecology's appeal was not timely filed and should be
12 dismissed.

13 Having entered the foregoing Findings of Fact and Conclusions
14 of Law, the Board now hereby enters the following:

15 ORDER

16 This appeal is dismissed.

17
18 DATED this 1st day of July, 1991.

19
20 Judith A. Bendor
21 JUDITH BENDOR, Chair

22 William A. Harrison
23 WILLIAM A. HARRISON
24 Administrative Appeals Judge

25 Hal Zimmerman
26 HAL ZIMMERMAN, Member

27 Annette S. McGee
28 ANNETTE MCGEE, Member

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER OF DISMISSAL - 5

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3 Presented by:

4 HELLER, EHRMAN, WHITE & MCAULIFFE

5
6 By

Leslie C. Neller

7 Leslie C. Neller

8 Washington State Bar #8758

9 Attorneys for Land Recovery, Inc.

10 Approved as to Form; Notice
11 of Presentation Waived:

12 Department of Ecology

13 By

approved by telephone 6/21/91

14 Mary Sue Wilson, AAG

15 Washington State Bar #

16 Attorneys for Department of Ecology

17 Approved as to Form; Notice
18 of Presentation Waived:

19 Tacoma-Pierce County Health Department

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21 By

approved by telephone 6/20/91

22 Robert Backstein

23 Washington State Bar #

24 Attorneys for Tacoma-Pierce County Health Department

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28 FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER OF DISMISSAL - 6

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